Supreme Court, U.S.
FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.

No. 87-1437

In the
Supreme Court of the United States

October Term, 1988

Blanton

versus

North Las Vegas

ON WRIT OF CERTIORARI TO THE
NEVADA SUPREME COURT

BRIEF FOR THE LOUISIANA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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September, 1988

QUESTIONS PRESENTED

The Louisiana District Attorney's Association will address the following question:

Whether the misdemeanor offense of driving under the influence of intoxicating liquor under state and federal constitutional law is a "serious" crime to which right to jury trial applies.

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INTEREST OF THE LOUISIANA DISTRICT ATTORNEYS ASSOCIATION

In Louisiana, driving while intoxicated is a misdemeanor that carries a maximum penalty of six months and/or up to a $500 fine. Under state law a DWI defendant is not entitled to a jury trial. Since the Louisiana judicial system statewide schedules DWI trials as non-jury trials and our more populated jurisdictions assign DWI trials to courts without jurisdiction over a jury trial, Louisiana has a substantial interest in the determination of whether or not a DUI is a "serious crime", notwithstanding its maximum penalties, such that a defendant is entitled to a jury trial. This Court's resolution of the issue could affect Louisiana's statutory scheme and create a substantial economic burden on the state and local governments if jury trials were required in DWI cases.

STATEMENT

The Supreme Court of Nevada consolidated several cases to consider whether or not DUI defendants were entitled to jury trials under the Nevada and United States Constitutions. *Blanton v. North Las Vegas Municipal Court,* 748 P.2d 494 (1987). After establishing that the right to a trial by jury under the Nevada Constitution was coextensive with that guaranteed by the Federal Constitution, the Supreme Court of Nevada concluded that the federal constitution does not require a right to a jury trial in misdemeanor cases where the maximum penalty is (6) months imprisonment and/or $1,000.00 fine. Further, it concluded that the decisions of the United States Court of Appeals for the Ninth Circuit which declared DUI a "serious " crime to which a right to a jury trial attaches are not binding upon the Nevada courts. The Nevada Supreme Court's opinion is now before this Honorable Court for review of the "serious" nature of a misdemeanor DUI such that a right to a jury trial attaches.

SUMMARY OF ARGUMENT

The states of Louisiana and Nevada have classified certain grades of DWI as offenses not warranting a trial by jury. Generally, the classification of state criminal offenses is largely a state matter provided that such does not violate clear federal constitutional requirements. The United States Supreme Court in a series of cases has established that crimes which carry possible penalties of up to six (6) months do not require a jury trial if they otherwise qualify as "petty" offenses but the penalty authorized for a particular crime is a major relevance in determining whether is it serious or not.

In decisions, below, the Fifth Circuit of the United States and the Supreme Court of the State of Nevada, while disagreeing on the exact meaning of various cases, trace the jurisprudential history of the right to a trial by jury. Although

these courts do not agree on reasoning, they concur in the final result: unless the penalty for DWI exceeds possible incarceration for six months, the right to a trial by jury for this offense is not mandated by the Constitution of the respective states nor by the United States Constitution.

The Nevada Court finds that the *Baldwin* "Bright-Line" is the only criteria to consider in determining the right to trial by jury. Chief Justice Gunderson of the Nevada Supreme Court, taking a judiciously pragmatic view, traces the Constitutional history of the right to a jury in *Blanton v. North Las Vegas,* 748 P.2d 494 (Nev., 1987). His conclusions for the Nevada High Court, considering both case law and policy, provide an objective constitutional rule. According to the Nevada Supreme Court, the doctrines of both *Callan v. Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888) and *District of Columbia v. Colts,* 282 U.S. 63 51 S.Ct. 52, 75 L.Ed. 177 (1930) have been sub silento replaced by the objective "Bright-Line" test of *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

There is certainly adequate authority for this viewpoint. Early decisions such as *Colts* and *Callan* explained the right to a trial by jury in a classically historical context. For example, in *Callan,* the court declared a Constitutional mandate for the right to a jury in trials of offenses indictable at common law, *Callan v. Wilson,* 127 U.S. 540, 557, 32 L.Ed. 223, 228, 8 S.Ct. 1301 (1888). By so doing, the *Callan* court remained true to the now-obsolete doctrine of original intent.

Later, in *Colts,* though not stating as much, the Supreme Court recognized what the United States Fifth Circuit en banc in *Landry v. Hoepfner,* 840 F.2d 1201 (5th Cir. 1988) calls offenses "without common law antecedents," 840 F.2d and 1209, thus exposing the "troublesome gap" the *Callan* rule leaves due to the plethora of post-common law offenses. Thus, the *Colts* court declared that any offense that is **malum in se,** or evil in and of itself, requires the availability of a jury trial to criminal defendants, *District of Columbia v. Colts,*

282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 77 (1930).

Neither the Louisiana Supreme Court nor the United States Fifth Circuit are willing to assume, as does the Nevada Supreme Court, that *Callan* and *Colts* have been overruled sub silentio in favor of the preferable objective "Bright-Line" rule first foreshadowed in *District of Columbia v. Clawans,* 300 U.S. 617, 846, 57 S.Ct. 660, 624, 81 L.Ed. 843, (1937) and *Duncan v. Louisiana,* 391 U.S. 45, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), and finally articulated in *Baldwin.* Because of this hesitancy, the *Landry* battle rested on whether DWI, La.R.S. 14:98, was either indictable at common law or evil in and of itself. While *Bairnsfather v. Louisiana,* 107 S.Ct. 1620 (1987) certainly lends credence to the interpretation on the law as read by the Nevada Supreme Court, only a positive, unequivocal statement by this Court can ever lay to rest this controversy.

It is respectfully submitted by the Louisiana District Attorneys Association that the Nevada Supreme Court is correct. Once this Honorable Court announced its decision in *Baldwin* that the "near uniform judgment of the nation" as to the seriousness of the offense is "the only objective criterion by which a line could ever be drawn . . . on the basis of the possible penalty alone . . .", 90 S.Ct. at 1890 (quoted p. 498 *Blanton*), the subjective tests enunciated in both *Callan* and *Colts* were effectively discarded.

Should this Honorable Court determine, however, that the tests enunciated in *Colts* and *Callan* survived *Baldwin,* then it is respectfully submitted that DWI was neither indictable at common law nor **malum in se.**

ARGUMENT

Supreme Court "Bright-Line" Analysis

Although the Sixth Amendment of the United States Constitution provides that, in all criminal prosecutions, the accused shall enjoy the right to trial by an impartial jury, the United States Supreme Court has limited that right to offenses classified as "serious". In *Callan v. Wilson,* 127 U.S. 540, 557, 8 S.Ct. 1301, 32 L.Ed. 223, 228 (1888), the Court stated that " 'in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose,' a jury trial is not required." Later the Court reiterated, in *District of Columbia v. Clawans,* 300 U.S. 617, 624, 81 L.Ed. 843, 846, 57 S.Ct. 600 (1937) that: " 'It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as "petty," which were tried summarily without a jury . . . .' "

In recent decisions, beginning with *Duncan v. Louisiana* 391 U.S. 45, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), the Supreme Court has developed definite guidelines for and attitudes toward offenses which are exempt from trial by jury. These emphasize the maximum penalty as the major relevance in determining whether or not a crime is serious and that classification of criminal offenses is largely a state matter as long as it does not violate clear federal constitutional requirements. *Cheff v. Schnackenburg,* 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966) (In determining the seriousness of the crime the court should refer to existing laws and practices in the Nation; that the penalty authorized for a particular crime is a major relevance in determining whether it is serious or not.). *Frank v. United States,* 395 U.S. 147, 148, 89 S.Ct. 1503, 1504, 23 L.Ed. 2d 162, 166 (1969) (the most relevant indication of the seriousness of an offense is the severity of the penalty authorized

for its commission.). *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (Repeated the need for objective criteria which reflected the seriousness with which society regards the offense and found the most relevant such criteria in the severity of the maximum authorized penalty.). *Argesigner v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) ("We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement. How crimes should be classified is largely a state matter."). *Welsh v. Wisconsin,*466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (The Supreme Court determined the classification of DWI as non felonious, or not a serious crime.). *United States v. Jenkins,* 780 F.2d 472 (4th Cir. 1986) cert. denied, _____ U.S. _____, 106 S.Ct. 2283, 90 L.Ed.2d 724 (1986) (The United States Supreme Court refused to review this opinion which examined and affirmed South Carolina's classification of a first offense DWI as nonserious).

In summation, the Supreme Court's attitudes in the foregoing cases reflect that crimes which carry possible penalties up to six months do not require a jury trial if they otherwise qualify as "petty" offenses but the penalty authorized for a particular crime is a major relevance in determining whether it is serious or not. The analysis of whether a crime is "petty" or not should refer to objective criteria, chiefly the existing laws and practices in the Nation. As a general rule, however, the classification of state criminal offenses is largely a state matter as long as it does not violate clear federal constitutional requirements.

Petty v. Serious

Under the Supreme Court's penalty analysis, DUI in Nevada and DWI in Louisiana do not qualify as offenses which require a trial by jury. The question then becomes whether DWI qualifies as a petty or serious offense. The courts have defined the following classes of offenses as

meeting the Constitutional threshold to be considered serious or non-petty for the purpose of determining whether a jury trial is required:

1. Offenses that are **malum in se,** *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 77 (1930).
2. Offenses that were subject to indictment at common law, *Callan v. Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888).
3. Offenses with severe penalties, *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). See also *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970);

Misdemeanor DWI fits none of the jurisprudentially defined classfications of "serious" offenses.

1) Whether The Offense Of DWI Is Malum In Se Or Malum Prohibitum

An offense is **malum prohibitum** when it proscribes some behavior that in itself is not morally offensive, or it is at the "first and lowest" stage of the prohibited behavior, *United States v. Stewart,* 568 F.2d 501 (9th Cir. 1978), or it is a reasonable regulation to carry out a stated purpose. *United States v. Arbo,* 691 F.2d 862 (9th Cir. 1982). Black's Law Dictionary, 712 (5th ed. 1979), defines "mala prohibita" as prohibited wrongs or offenses; acts which are made offenses by positive laws, and prohibited as such. Acts or omissions which are made criminal by statute but which, of themselves, are not criminal. Generally, no criminal intent or **mens rea** is required and the mere accomplishment of the act or omission is sufficient for criminal liability. The term is used in contrast to **mala in se** which are wrongs in and of themselves such as robbery.

Thus, each state's legislature has the power to create crime without requiring the mental element of "specific intent". Specific intent is not a necessary element and in such cases doing the act constitutes the crime. 22 C.J.S. Criminal Law §30 p. 102 (1961). It is the intention to do the forbidden act which is sufficient and the doer may be criminally liable even though he had no knowledge the act was criminal, had no intention to violate the law or was even ignorant as to the law's existence. 22 C.J.S. §30 p. 100 (1961). These **mala prohibita** offenses are "in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 246, 96 L.Ed.2d 288 (1952). Many violations of such regulations do not result in "direct or immediate injury to person or property but merely create the danger or probability of which the law seeks to minimize." These violations may be considered offenses against the state's authority and their occurrences upset the ability of a state to maintain social order. *Id.,* at 246.

In contrast, Black's Law Dictionary, 712 (5th ed. 1979), defines **malum in se** as "a wrong in itself; an act or case of natural, moral, and public law. *Grindstaff v. State,* 214 Tenn. 58, 377 S.W.2d 921, 926; *State v. Shedoudy,* 45 N.M. 516, 118 P.2d 280, 287. An act is said to be **malum in se** when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Most of the offenses cognizable at common law are such **malum in se** offenses (without the denouncement of a statute); as murder, larceny, etc." Hence, the concept of **malum in se** is inexorably tied to those crimes at common law.

The United States Supreme Court in *Morissette v. United States,* supra, identified the requirement of a culpable state of mind of the doer in prescribing those offenses that are "malum in se". Any injury can amount to a crime only when inflicted by intention. *Morissett,* supra, at 243. "(T)o

constitute any crime there must first be a "vicious will' " (*Morissette,* supra at 244, quoting Blackstone, 4 Bl.Comm 21). It is this vicious will, or the "intent" to commit an evil act, coupled with the doing of the evil act that causes an offense to be criminal. "Intent", therefore, forms the requisite "mental element" inherent in **malum in se** offenses. Thus, when an offense is morally offensive it is considered **malum in se,** however, these offenses are usually based on common law crimes where a specific intent requirement is incorporated into a definition of the offense. *United States v. Hussein,* 675 F.2d 114 (6th Cir. 1982); Morissette v. United States, supra.

Louisiana's DWI statute[1] does not incorporate specific intent into the offense and is classified as a general intent crime. Moreover, the statute is prohibitory; it proscribes an activity which in itself is not reprehensible. A violation of DWI results in no direct or immediate injury to person or property but merely creates the danger or possibility of it which the law seeks to minimize. Such a violation is basically against the authority of the state irrespective of the intent of the violator. As the Court in *Morissette,* supra, at 246, said in discussing regulatory statutes, "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."

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[1]La.R.S. 14:98 Operating a vehicle while intoxicated

A. The Crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when:

(1) The operator is under the influence of alcoholic beverages; or

(2) The operator's blood alcohol concentration is 0.10 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood; or

(3) The operator is under the influence of any controlled dangerous substance listed in Schedule I, II, III IV, or V as set forth in R.S. 40:964.

A technical violation of the DWI statute can be likened to running a red light: if there are oncoming vehicles and the offender recklessly fails to stop, the results can be tragic. Alternatively, at three in the morning, on a deserted strip of highway, a cautious driver proceeding before the cycle has completed, has not committed a "serious" offense. State legislatures, the judiciary and Constitution recognize this and classify running a red light as a petty offense. Similarly, a cautious driver violating no other statutes or ordinances, can be guilty of DWI with a blood alcohol content of 0.10%. This can be true even if the offender's reflexes are not impaired to the extent that the average person's would be at that blood alcohol level. The offender has no criminal intent and causes no harm. Thus, the crime of DWI, by itself, is clearly **malum prohibitum:** a forbidden behavior with potential for danger.

Moreover, if the prohibited behavior of DWI involves bodily injury, property damage or death, there are other chargeable offenses which reflect the more serious consequences. If an offender, in addition to violating the DWI statute, is driving recklessly, the offense becomes by its nature serious. If, on the other hand, an offender operates a vehicle, otherwise lawfully, and is arrested at a roadblock for DWI, the offense he has committed does not fit the traditional definition of **malum in se.**

Hence, after reviewing the history and elements of **malum prohibitum** and **malum in se** in regard to a DWI violation, it must be classified as **malum prohibitum** since there is no specific intent nor force or violence incorporated into the offense itself but merely prohibitory language.

2) Whether The Criminal Act Was Indictable At Common Law

Obviously, the offense of misdemeanor DWI was not an offense indictable at common law since automobiles did not exist at the time of the formulation of the list of such

offenses. The development of a motorized vehicle as the major mode of travel has also promoted the development of paved, well-marked roadways, traffic control devices, and increased speeds unimaginable at common law. Society's attitudes toward travel and speed have changed so dramatically that a comparison of driving an automobile or 18-wheeler with a horse drawn buggy is unjust. An example of society's current attitude toward speed and accident is the recent increase in the speed limit on the Nation's highways from 55 miles per hour to 65 miles per hour despite the statistics which show that increased speed increases accidents and deaths on our highways. Hence, the common law offers no guidance in the area of traffic control and offenses because of the technical advances and corresponding changes in society's perceptions and values.

Petitioners below have misquoted *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930), as authority for recognizing misdemeanor DWI as constitutionally "serious". In fact, the statutory violation in *Colts* is distinguished from a statutory violation of misdemeanor DWI. Defendant in *Colts* violated a District of Columbia traffic code which prohibited driving more than 22 miles per hour except in certain areas. In addition, the statute enumerated more serious violations in section (b), with which this defendant was also charged: (b)(1)(2)(3); (1) recklessly; (2) at a rate of speed greater than is reasonable and proper, having regard to the width of the public highway, the use thereof, and the traffic thereon; (3) in such a manner and condition so as to endanger property and individuals. Thus the opinion analyzes a violation that has more elements, with possible serious consequences, than a violation of DWI. In fact, the offenses in question in the *Colts* case were "operating a certain motor vehicle at a greater rate of speed than . . . was reasonable and proper . . . in such a manner and condition so as to endanger property and individuals.

The statute in question included speeding *and* [emphasis ours] reckless operation but not DWI. It was this statute that

the *Colts* court found to be the equivalent of a crime indictable at common law Id., 282 U.S. at 73, 51 S.Ct. at 53, 75 L.Ed. at 179.

In reaching its decision in *Colts*, supra, the Court relies on *State v. Rodgers*, 102 A. 433 (N.Y. 1917) for its analysis. *Rodgers*, to the contrary, found that the "driving of an automobile upon a public street, while under the influence of intoxicating liquor is not a public or common nuisance indictable at common law." 102 A. 434. Once again the offense of DWI was not deemed a public nuisance until another element (in *Colts*, reckless operation) is added.

3) Whether The Collateral Consequences Of A DWI Conviction Are Relevant To Its Classification

The final category of offenses that are deemed serious for the purposes of triggering the right to a jury trial are those carrying a penalty so severe, that an otherwise trivial offense must be regarded as non-petty, and entitle the accused to a trial by jury. See *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). The Court has ruled specifically on the "Bright-Line" beyond which a penalty would engage the right to a trial by jury. This "Bright-Line" is the possibility of six months imprisonment, *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) and *Frank v. United States*, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969). Assuming the penalty does not exceed this limit, the Court may examine whether "the severity of the punishment, by itself, [is] sufficient to take the offense out of the petty category", *United States v. Sanchez-Mesa*, 547 F.2d 461, 464 (9th Cir. 1976) citing *Clawans*, infra. It is significant that the United States Supreme Court speaks not to the "collateral consequences" of a conviction but to the "severity of the penalty."

It is submitted that the collateral consequences of a conviction are not determinative of the seriousness of a crime.

A review of the collateral consequences of a misdemeanor DWI conviction reveals that those consequences do not qualify it as a serious crime for purposes of a constitutional right to trial by jury.

In lieu of a jail sentence for a DWI conviction, a defendant in Louisiana is usually placed on probation with the conditions that he attend a substance abuse program, a driver's education program and perform four eight-hour days of community service. These conditions certainly reflect rehabilitative consequences as opposed to penal ones. They also reflect a legislative decision that a first offense DWI is a regulatory measure in the exercise of what is called police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crime, as in the case of "malum in se". See *Morissette v. United States*, 342 U.S. 258, 72 S.Ct. at 247. Thus, the conditions of probation represent the legislative intent of social betterment in the classification of DWI as **malum prohibitum.**

It is argued that the possible loss of license as an additional consequence of a DWI conviction should classify it as **malum in se.** This argument fails to acknowledge that there are statutes which provide a remedy for persons whose suspension of driving privileges will deprive him or his family of the necessities of life, or will prevent him from earning a livelihood. Furthermore, in Louisiana, loss of a driver's license is also a collateral consequence of failure to stop or passing a school bus which is stopped for loading or unloading children, failure to stop and render aid as required under the laws of this state, three charges of reckless driving committed within a period of twelve months, violations of R.S. 32:414.1, constituting an unlawful use of driver's license, and for other enumerated serious and petty offenses. Hence, loss of license is a consequence of numerous petty as well as felonious offenses and can hardly be used to classify this behavior as **malum in se.** Moreover, the threatened loss of livelihood is provided for by the issuance of a restricted license.

It is further argued that a DWI conviction is held in general scorn and opprobrium by our society as reflected by the publishing of names and addresses of arrestees. This argument fails to consider that the vital information of arrestees for other crimes is also published in the daily newspaper: theft, simple criminal damage to property, battery, possession of marijuana, assult - all classified as misdemeanor, or petty offenses in Louisiana for which a trial by jury is not available. There is no basis to assume that a DWI arrest would carry any more stigma than an arrest based on other misdemeanor charges.

Finally, it is claimed that the insurance consequences of a DWI conviction contribute to the basis of its classification as a serious offense. This reasoning can also be applied to most other minor moving violations for motor vehicles. Thus, using the collateral consequences reasoning, a violation of driving 25 miles per hour in a 20 mile per hour zone should have a right to a trial by jury since most of the aforementioned consequences are applicable.

It is clear that the other so-called "catastrophic" consequences of a DWI conviction are all well within the court's discretion on other misdemeanors. Substance abuse treatment, social services, education, community and incarceration are all tools used by courts in other petty offenses.

The Supreme Court has yet to require trial by jury for all offenses whether petty or serious and Louisiana's and Nevada's classifications of its vehicular regulatory statutes as "petty" should be maintained.

CONCLUSION

With the enunciation of *Baldwin's* "Bright-Line" test, the tests of *Colts* and *Callan* were overruled **sub silentio.** Since a violation of Louisiana's DWI statute does not carry a penalty which crosses *Baldwin's* "Bright-Line", those charged with first offense DWI have no constitutional right to a trial by jury.

Should this Honorable Court determine that *Colts* and *Callan* are still valid legal constitutional interpretations of the right to a trial by jury, then it is respectfully submitted that the offense for which the appellant was convicted does not fit any of the classifications recognized by the courts as entitling defendant to a trial by jury. The decision in *United States v. Craner,* 652 F.2d 23 (9th Cir. 1981) misinterprets *Colts* as precedent for DWI and **malum in se.**

The Louisiana Legislature clearly defines this offense as one which should be tried before a judge alone. The State has positively and properly exercised its police power in a manner that conforms to the decisions of the United States Supreme Court.

Considering the foregoing law and argument, the classification of DWI, or a DUI, as a "petty" offense, a misdemeanor, without the right to a trial by jury, does not violate Federal Constitutional standards nor does it otherwise qualify as a "serious" offense such that a defendant has a right to trial by jury and the decision of the Supreme Court of Nevada should be affirmed.

Respectfully Submitted,

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